Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

NENITA SABATER,

Petitioner

V.

MICHAEL BIAS

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHEN OR UNDER WHAT CIRCUMSTANCES, IF ANY, MAY A DEFENDANT, WHO TIMELY ASSERTED A QUALIFIED IMMUNITY DEFENSE, BE DEPRIVED OF INTERLOCUTORY APPELLATE REVIEW OF ISSUES OF LAW RELATING TO QUALIFIED IMMUNITY.

II. WHETHER THE UNITED STATES COURT OF APPEALS WAS WITHOUT JURISDICTION TO DECIDE ISSUES OF LAW RELATING TO THE TIMELY ASSERTION OF QUALIFIED IMMUNITY AS A DEFENSE VIA AN INTERLOCUTORY APPEAL, BECAUSE THE ISSUE OF LIABILITY HAD BEEN DECIDED AT A BENCH TRIAL.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioner, Nenita Sabater, M.D.

Respondent, Michael Bias

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I. WHEN OR UNDER WHAT CIRCUMSTANCES, IF ANY, MAY A DEFENDANT, WHO TIMELY ASSERTED A QUALIFIED IMMUNITY DEFENSE, BE DEPRIVED OF INTERLOCUTORY APPELLATE REVIEW OF ISSUES OF LAW RELATING TO QUALIFIED IMMUNITY.

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II. The Court of Appeals has misinterpreted this Court's Opinion in the case of *Mitchell v. Forsyth*, 472 U.S. 511 (1985)

III. The policy reasons intended to protect the defendant who asserts the defense of qualified immunity are not solely limited to protection from trial on the issue of liability.

IV. The defendant in this case not only has the burden of trial on the issue of damages, but since the District Court's Memorandum Opinion and Order states that "monetary damages will be determined at a later date" the defendant may reasonably expect to be burdened with the need and desire to supercede the damages award during pendency of an appeal from a final judgment in this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner herein respectfully prays that writ of certiorari issue to review a final judgment of the United States Court of Appeals for the Fifth Circuit entered in this action on October 23, 2003.

OPINIONS BELOW

The decision of the district court is not reported and is interlocutory. (App. B)

The decision of the United States Court of Appeals for the Fifth Circuit is not reported. (App. A)

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 23, 2003. This Court has jurisdiction to review the final judgment of the United States Court of Appeals pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291

42 U.S.C. § 1983

STATEMENT OF THE CASE

(i) STATEMENT OF FACTS.

For ease of identification the following will be used throughout this petition:

Petitioner will be called Dr. Sabater.

Respondent will be called Michael Bias.

This is a civil rights action filed under 42 U.S.C. § 1983, in federal court. Michael Bias is a prisoner of the State of Texas. Dr. Sabater, was a Psychiatrist with the Texas Prison System at the time of the alleged complaints made by Michael Bias in this case. Michael Bias raised complaints relating to the rendering of medical services by Dr. Sabater and other related complaints against other individuals. The trial court dismissed all other defendants except Dr. Sabater.

(ii) COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

Initially the District Court sua sponte dismissed this *pro se* prisoner civil rights case for failure to state a claim. This dismissal occurred prior to Dr. Sabater being served with process. Michael Bias appealed the dismissal and the Court of Appeals reversed and remanded the case to District Court for further proceedings.

Dr. Sabater formally pled qualified immunity and timely moved for summary judgment based on qualified immunity, as well as other grounds not germane to this appeal.

The District Court denied Dr. Sabater's Motion for Summary Judgment in its entirety by written "Order" distributed to the parties and counsel on July 8, 2002. Minutes later the District Court called the case for trial and an evidentiary hearing was conducted which lasted several hours. The "trial" concluded prior to the lunch hour on July 8, 2002,

and thereafter on July 26, 2002, the District Court issued a "Memorandum Opinion and Order" denying Dr. Sabater's qualified immunity defense and finding Dr. Sabater liable. The "Memorandum Opinion and Order" provided that "Monetary damages will be determined at a later date after any further proceedings which may be deemed necessary by the Court. Final judgment will be entered at that time." (see page 15 of Appendix B)

Dr. Sabater took an immediate interlocutory appeal from the denial of qualified immunity contained in the "Memorandum Opinion and Order" of July 26, 2002, pursuant to the provisions of 28 U.S.C. § 1291, to the United States Court of Appeals for the Fifth Circuit.

The Court of Appeals declined to review the District Court's denial of qualified immunity and held that the Court of Appeals lacked jurisdiction to decide the issue of qualified immunity because there had already been a bench trial that

decided the issue of liability against Dr. Sabater and remanded the case to the District Court to proceed to enter a final judgment following a hearing on the issue of damages.

Dr. Sabater did not file a Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals is contrary to the well established body of federal case law involving the right to an interlocutory appeal of the denial of qualified immunity.

II. The Court of Appeals has misinterpreted this Court's Opinion in the case of *Mitchell v. Forsyth*, 472 U.S. 511 (1985)

III. The policy reasons intended to protect the defendant who asserts the defense of qualified immunity are not solely limited to protection from trial on the issue of liability.

IV. The defendant in this case not only has the burden of trial on the issue of damages, but since the District Court's Memorandum Opinion and Order states that "monetary damages will be determined at a later date" the

defendant may reasonably expect to be burdened with the need and desire to supercede the damages award during pendency of an appeal from a final judgment in this case.

V. The defendant took the first interlocutory appeal available to her in this case.

BEST AVAILA

ARGUMENT AND AUTHORITIES

Procedurally the defendant timely pled her affirmative defense of qualified immunity and timely filed her Motion for Summary Judgment raising her defense of qualified immunity.

The District Court found in his "Order" denying Dr. Sabater's Motion for Summary Judgment, which order was distributed to the parties and counsel immediately prior to the Court calling the case for trial:

> "However, there remain disputed factual issues related to Dr. Sabater's knowledge of Plaintiff's condition and with regard to the reasonableness of her conduct under the circumstances. Absent a determination on the disputed facts of this case, the Court cannot make a determination as to whether or not

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> Plaintiff was wrongfully denied care under the circumstances. . . . .
>
> Unfortunately, the Court is unable to determine, upon the present record, whether or not Dr. Sabater is entitled to qualified immunity. . . ."

This finding by the District Court effectively denied Dr. Sabater a right of interlocutory appeal from the denial of her Motion for Summary Judgment, because the decision of the District Court explicitly stated that by its terms that it was tentative, and incomplete concerning the issue of qualified immunity because of unresolved issues of disputed fact. See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 142-143 (1993) Further, the "Order" denying Dr. Sabater's Motion for Summary Judgment on the issue of qualified immunity, on it's face,

did not "[1] conclusively determine the disputed question, . . ." *Johnson v. Jones*, 515 U.S. 304, 310 (1995)

Within minutes of the District Court distributing his "Order" denying Dr. Sabater's Motion for Summary Judgment the District Court proceeded to call the case for trial. For several hours, concluding before noon on the 8th day of July 2002, the District Court heard evidence in the case.

Thereafter the District Court issued its "Memorandum Opinion and Order" of July 26, 2002, finding that that "defendant Sabater is liable for plaintiff's injuries under 42 U.S.C. § 1983. Monetary damages will be determined at a later date after any further proceedings which may be deemed necessary by the Court. Final judgment will be entered at that time." The District Court further addressed Dr. Sabater's qualified immunity defense and conclusively denied it.

Clearly the District Court's "Memorandum Opinion and Order" of July 26, 2002, was an interlocutory order and just as clearly it completely disposed of Dr. Sabater's qualified immunity defense on its merits and was fully appealable under the doctrines of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

Federal case law teaches that the qualified immunity defense is entitled to be finally resolved by the trial court prior to the defendant being "subjected to pretrial proceedings." *Behrens v. Pelletier*, 516 U.S. 299, 312 (1996) Contrary to the statement that the "entitlement is an *immunity from suit* rather than a mere defense to liability" referenced in the Opinion of the Court of Appeals (see page 3 of Appendix A) this Court made clear in *Behrens v. Pelletier, supra*, that "The *Harlow* right to immunity is a right to immunity from certain claims, not from litigation

in general, when immunity with respect to those claims has been finally denied, appeal must be available and cannot be foreclosed by the mere addition of other claims to the suit." *Id.* at 312. This Court in *Behrens* continued to elaborate on the distinctions involved in the denial of Motions for Summary Judgment for reasons of unresolved fact as explained in the case of *Johnson v. Jones, supra.* In the decision of the District Court in this case the District Court clearly stated that it was unable to rule on issues of law related to the defense of qualified immunity because of unresolved disputed fact issues. This type of ruling renders the order denying summary judgment as to qualified immunity unappealable under *Cohen, supra.*

In this case, the District Court required the parties to begin trial immediately after distributing his order denying Dr. Sabater's Motion for Summary Judgment qualified immunity defense in such a manner that it was

not an immediately appealable order until evidentiary issues were resolved. The evidentiary hearing immediately held had the effect of resolving the disputed fact issues and enabled the District Court to then rule on the entirety of the merits of Dr. Sabater's qualified immunity defense. The "Memorandum Opinion and Order" wherein the District Court ruled on the merits of Dr. Sabater's qualified immunity claim following the evidentiary hearing was clearly not a final judgment and the District Court so stated at the conclusion of the Memorandum Opinion and Order, however, it had become an appealable decision on the issue of qualified immunity.

Apparently because so many cases have recited the opinion that the intent of providing a respite from the burden of trial for the defendant asserting the defense of qualified immunity, the Court of Appeals reasoned that Dr. Sabater had lost any right to make an interlocutory appeal

because she had participated in a trial and had the issue of liability decided against her, thereby impairing her "entitlement" of "immunity from suit". This reasoning and response by the Court of Appeals ignores the fact situation contained in the lead case of *Mitchell v. Forsyth, supra*, which closely resembles the case before the court, with the exception that liability was decided against the defendant asserting qualified immunity in *Mitchell v. Forsyth, supra*, by virtue of a motion for summary judgment with the remaining issue of damages outstanding at the time that Forsyth took his interlocutory appeal rather than being decided in a bench trial as in the case presently before this Court.

In *Mitchell v. Forsyth*, Justice White wrote:

> ". . . . With respect to the denial of qualified immunity, the Court of Appeals held that the District Court's order was not appealable

under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Fearing that allowing piecemeal appeals of such issues would unduly burden appellate courts, the court was unwilling to hold that the goal of protecting officials against frivolous litigation required that orders denying qualified immunity be immediately appealable. Forsyth's claim, the court noted, was not a frivolous one, and the policies underlying the immunity doctrine would therefore not be frustrated if Mitchell were forced to wait until final judgment to appeal the qualified immunity ruling [fn4] *Forsyth v. Kleindienst*, 729 F.2d 167 (1984) The court therefore remanded the case to the

District Court for further proceedings leading to the entry of final judgment . . . ."

The posture that the *Mitchell v. Forsyth, supra*, case arrived at the Court of Appeals, was stated by Justice White as:

> "The court therefore denied Mitchell's motion for summary judgment, granted Forsyth's motion for summary judgment on the issue of liability, and scheduled further proceedings on the issue of damages, *Forsyth v. Kleindienst*, 551 F. Supp. 1247 (1982)."

In *Mitchell v. Forsyth, supra,* the issue of liability was decided via a Motion for Summary Judgment and not a "Trial" as such. In the case at bar, the issue of liability was decided via a bench trial.

The Court of Appeals in the present case holds that since the sole reason for granting piecemeal appeals of

qualified immunity issues is the policy of protecting the defendant from the burden of trial and since the defendant had not avoided "trial" in this case, that the Court of Appeals lacked jurisdiction to decide the issue of qualified immunity in this case.

The holding of the Court of Appeals does not take into consideration that the defendant must still participate in a trial on the issue of damages and that the defendant will be burdened with the need or desire to supercede any monetary judgment awarded against her by the District Court during the pendency of an appeal from a "Final Judgment" and that this burden may well be heavy and unnecessary in the event that the District Court's decision on the defense of qualified immunity were to be reversed on appeal.

The distinction between establishing liability by virtue of a Motion for Summary Judgment as in *Mitchell v.*

Forsyth, supra, and establishing liability by virtue of a bench trial, leaving in both instances the issue of damages for later determination, does not justify the difference in treatment and should not deprive the defendant of her right to take an interlocutory appeal from the denial of her defense of qualified immunity.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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United States Court of Appeals
Fifth Circuit
FILED
October 23, 2003
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-10889
Summary Calendar

MICHAEL BIAS,

Plaintiff-Appellee,

versus

LESLIE WOODS; ET AL.,

Defendants,

NENITA SABATER,

Defendant—Appellant.

- -

Appeal from the United States District Court
For the Northern District of Texas
USDC No. 7:99-CV-33-R

- -

Before JONES, BENAVIDES, and CLEMENT, Circuit Judg

PER CURIAM:*

Nenita Sabater brings this interlocutory appeal to challenge the trial court's finding following a bench trial that she was not entitled to qualified immunity in defense of the claims brought against her by Michael Bias, Texas prisoner # 769345. This Court must raise, sua sponte, the issue of its own jurisdiction, if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). We have jurisdiction of "appeals from all final decisions of the district courts." 28 U.S.C § 1291. "[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C § 1291 notwithstanding the absence of a final judgment."

---

* Pursuant to 5TH Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH Cir. R. 47.5.4.

BEST AVAIL

Mitchell v. Forsyth, 472 U.S. 511m 530 (1985). The rationale of the Supreme Court in extending the collateral order doctrine to appeals from denials of qualified immunity was that the "entitlement is an *immunity from suit* rather than a mere defense to liability" and would be "effectively lost if a case [was] erroneously permitted to go to trial." Id. at 526. Mitchell was an appeal from a denial of qualified immunity raised in a motion for summary judgment. A district court's denial of summary judgment on the issue of qualified immunity "conclusively determines the defendant's claim of right not to *stand trial*" and that is the basis for the court's decision to allow an immediate appeal. Id. at 527. That Rational does not apply in this case. Sabater has not avoided trial; she has already been adjudged liable for Bias's injuries, although damages have not yet been determined. "an order that determines the liability but leaves unresolved the

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assessment of damages is not final within the meaning of [28 U.S.C §] 1291." Southern Travel Club v. Carnival Air Lines, Inc., 986 F.2d 125, 129-30 (5th Cir. 1993).

The policy of the final judgment rule against piecemeal and duplicative litigation, as embodied in 28 U.S.C. § 1291, is offended by Sabater's attempted appeal in this case. Matter of U.S. Abatement Corp., 39 F.3d 563, 567 (5th Cir. 1994). Sabater's argument can be considered and reviewed in an appeal from any final judgment that follows the district court's assessment of damages. We therefore DISMISS this appeal for lack of jurisdiction.

Bias has moved for appointment of counsel and has filed two motions for leave to file an out-of-time brief. These motions are DENIED AS MOOT.

U.S. District Court
Northern District of Texas
FILED
JUL 26 2002
CLERK, U.S. DISTRICT COURT
By "s/ T. Stewart"
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

MICHAEL BIAS	§	
TDCJ NO. 769345	§	
Plaintiff,	§	
	§	
V.	§	7:99-CV-033-R
	§	
LESLIE WOODS, *et al*,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

On the 8th day of July, 2002, came on for trial the above styled and numbered cause wherein *pro se* plaintiff Michael Bias and through counsel, defendant Nenita Sabater,

M.D. appeared before this Court[1]. There being no timely demand for a jury trial, the case was tried before the Court. The action was brought pursuant to 42 U.S.C § 1983 by an inmate who, at the time of the events giving rise to his complaint, was confined in the Allred Unit of the Texas Department of Criminal Justice in Iowa Park, Texas.

Plaintiff claims that, on May 20, 1997, he was denied proper medical care in violation of his Eighth Amendment rights after he attempted suicide by taking an overdose of psychiatric medication and cutting his left wrist. Complaint ¶ *V.* Plaintiff alleges that Dr. Nenita Sabater failed to transport him to the hospital after he slipped into a coma and that he remained comatose for two days. *Id.* On May 22, 1997, pursuant to Dr. Sabater's order, Plaintiff claims he was transported approximately 150 miles to the Robertson Unit in

Abilene, Texas where, upon arrival, medical care personnel sent him to the Hendricks Medical Center. *Id.* At Hendricks, doctors determined that Bias suffered necrosis and other tissue damage to his right hip, leg and buttock as a result of lying on his right side for an extended period of time during his coma. *Id.*

Plaintiff states that he was hospitalized in the Hendricks Medical Center for thirteen days then transported to the Montford Unit Regional Medical Facility where a physician, Dr. Cofie, confirmed the diagnosis of necrosis and other tissue damage to plaintiff's right hip, leg and buttock as a result of lying on his right side for an extended period of time. *Id.* Bias was then transported to the University Medical Center where he underwent two surgical procedures and spent thirty days recovering in the burn unit. *Id.* Afterward,

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[1] Plaintiff's Claims against all defendants except Dr. Sabater were dismissed prior to trial

Bias states that he underwent five months of physical therapy. *Id.* Bias claims that Dr. Sabater was deliberately indifferent to his need for medical care and that his injuries resulted from her failure to provide such care. *Id.* He now seeks monetary damages for plastic surgery to repair his scars. *See id. at ¶ VI; Plaintiff's Supplemental Complaint p.7.*

Defendant, Dr. Nenita Sabater, denies the plaintiff's allegations. Dr. Sabater claims that she acted in good faith in providing appropriate medical care to Mr. Bias and that her conduct was objectively reasonable. *Answer of Defendant Nenita Sabater, M.D. p.2.* She claims that she was not deliberately indifferent to his serious medical needs, that she did not violate his rights under the Eighth Amendment and that she is entitled to qualified immunity from suit. *Id.*

In order to state a colorable claim for the denial of medical care under the Eighth Amendment, an inmate must

allege acts or omissions "sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292 (1976). "Deliberate indifference" under the Eight Amendment occurs only where a prison official subjectively knows of and disregards a substantial risk to the inmate's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 1979 (1994); *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 650 (5th Cir. 1996). Liability under the Eighth Amendment requires that a prison official be aware of facts from which an inference could be drawn that a substantial risk of serious harm exists, and he must actually draw that inference. *Farmer*, 511 U.S. at 837, 114 S.Ct. at 1979. "Under exceptional circumstances, a prison official's knowledge of a substantial risk of harm may be inferred by the obviousness of the substantial risk." *Harris v. Hegmann*, 198 F.3d 153, 159 (5th Cir. 1999)(quoting Reeves v. Collins, 27 F.3d 174, 176

(5th Cir. 1994)).

A prison official may be "deliberately indifferent" so as to give rise to a § 1983 civil rights action if the official intentionally denies or delays a prisoner's access to medical care and such conduct results in substantial harm. *E.g. Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993); *Walker b. Butler*, 967 F.2d 176, 178 (5th Cir. 1992); *Wesson v. Oglesby*, 910 F.2d 278, 284 (5th Cir. 1990); *See Harris v. Hegmann*, 198 F.3d at 159 (finding that a colorable Eighth Amendment claim was stated where the inmate alleged that his repeated requests for medical treatment, after the failed surgical repair of a broken jaw, were ignored).

While delay in providing treatment may rise to the level of a constitutional violation, negligent or erroneous medical treatment or judgment does not provide a basis for a § 1983 claim. *Graves v. Hampton*, 1 F.3d 315, 319 (5th Cir. 1993). As long as jail medical personnel exercise professional

medical judgment, their behavior will not violate a prisoner's constitutional rights. *See Youngberg v. Romeo*, 457 U.S. 307, 322-23, 102 S.Ct. 2452, 2461-62 (1892). A disagreement over the appropriate medical treatment constitutes, at most, a possible claim of medical malpractice appropriately addressed under state law.*E.g. Estelle v. Gamble*, 429, U.S. at 107-08, 97 S.Ct. at 293; *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991); *Fielder v. Bosshard*, 590 F.2d 105, 107 (5th Cir. 1979).

At trial, testimony revealed that Michael Bias arrived at the Allred Unit on May 1, 1997 with a history of suicide attempts. Dr. Sabater was Bias' treating psychiatrist during his confinement in the Allred Unit. Dr. Sabater diagnosed Mr. Bias as suffering from clinical depression. She and her staff provided counseling services twice each week and prescribed anti-depressant and anti-psychotic medications for Mr. Bias. Dr. Sabater was aware that Plaintiff had suicidal thoughts,

however, he indicated to her staff that he would not attempt to commit suicide. On May 20, 1997, Bias attempted suicide by slashing his wrist and by taking an overdose of seven different medications he had collected for about a month by obtaining his daily medicines and saving them. For his own safety, Bias was placed in a suicide watch cell with nothing but a blanket.

The next day, May 21, 1997, Dr. Sabater saw the plaintiff in his comatose state. She concluded that he suffered from sever depression and that he was withdrawn and did not want to talk. She testified that, on May 21, 1997, she recommended plaintiff's transfer to the Montford Unit which specializes in psychiatric treatment, however, he was not transported until the next day.[2] Dr. Sabater testified that she

[2] Although Dr. Sabater testified that she recommended transfer to the Montford Unit in Lubbock, Texas, Plaintiff was transferred to the

did not see the plaintiff until twelve to sixteen hours after his overdose. Dr. Sabater claims that she was not aware that Plaintiff had taken the drugs and that the medical records indicated that Bias denied taking any drugs.

The testimony and exhibits presented at trial reflect that, on May 22, 1997, Michael Bias was transported from Allred to the Robertson Unit at the direction of Dr. Sabater. *See Defendant's Trial Exhibit No. 1 p.6, and p.1 of Clinical Notes. Attached thereto.* This fact was undisputed at trial. Bias was transported 150 miles during which time he did not awaken and he did not move. *Defendant's Trial Exhibit No. 1 p.15.* Plaintiff testified that, as a result of being transported in a comatose state where he was placed in a prone position on the floor of a van without being moved, he suffered a compression injury causing necrosis and infection in his right

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Robertson Unit in Abilene, Texas. There is nothing in the record to explain this discrepancy.

hip, buttocks and thigh. The exhibits submitted at trial support plaintiff's testimony. The cause of his injuries (i.e. – being transported while unconscious) was not disputed by defendant at trial.

The record reflects that Bias suffered necrotizing soft tissue infection that required a skin graft in the right gluteal area with followup treatment in the University Medical Center Burn Clinic. *Plaintiff's Trial Exhibit No. 1 pp. 27, 87, 92, 101, &136.* Medical records indicate that Bial had a wound in his right hip region approximately 10 inches in diameter. *Id. at p. 155.* The record reflects that the "graft region begins [on] the upper outer [right] thigh and ends approximately mid-calf from mid-calf to outer calf." *Id.* There is "also a graft site to [his] left inner thigh approximately 8" X 6"." *Id.* The Court viewed Bias' right hip, thigh and leg and confirmed that he suffered substantial physical injury.

Bias testified that he suffered permanent disfigurement

and that he suffers continuing medical problems resulting from his injuries. He testified that he lost the skin from his right leg up to his hip, that there remains a hole in his right gluteus maximus, that his right buttock is gone and that he can't sit or stand too long because of the nerve damage and muscle loss. The exhibits submitted at trial support Bias' claims of injury and continuing medical problems and such claims were un-refuted by defendant at trial. *See Plaintiff's Trial Exhibit No. 1 pp.168, 208, 218, & 220.*

A videotape, taken by Allred Unit officials on May 22, 1997, reflects the circumstances surrounding Bias' preparation for transport from the Allred Unit to the Robertson Unit. The videotape was submitted as an exhibit with Defendant's Motion for Summary Judgment and was admitted by the Court at trial as the Court's Exhibit No. 1.

The video clearly reflects that Mr. Bias was lying naked on the floor of his cell and that he was not responsive to orders given by guards. A use-of-force team entered the cell and tried to awaken Mr. Bias. An ammonia capsule was used in an attempt to awaken him at which time he appeared to groan and exhibit some slight movement. However, Bias was, for all practical purposes, unconscious and guards had to dress him for transport. Dr. Sabater is on the videotape and appears to be supervising the preparation to transport Bias out of Allred. Bias' vital signs were checked twice during this process and they were normal.

At least one officer, Dalton Agnew, had reservations about transporting Bias because Bias appeared unconscious. *Defendant's Trial Exhibit No. 1 p. 13.* Agnew contacted his supervisor and was directed to continue with the transport. *Id.* When Mr. Bias arrived at the Robertson Unit, he was lying on the floor of the transport van, his skin was displaced

and he was not responsive to verbal stimuli or painful stimuli. *Id. at p. 2*. Bias testified that a physician at the Robertson Unit had him transported to the hospital by ambulance.

Upon consideration of the papers, pleadings, testimony and other evidence presented in this case, the Court initially finds that Dr. Sabater's qualified immunity defense must fail. Government officials are entitled to qualified immunity from suit when performing discretionary functions unless their conduct violated statutory or constitutional rights, clearly established at the time of the alleged incident, of which a reasonable person would have known. *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir. 1995). An inmate's rights to medical care under the Eighth Amendment was clearly established at the time of the incidents giving rise to this lawsuit. The Court finds that a reasonable person would have known that her conduct in ordering the transportation of an inmate in Bias'

condition to a prison unit 150 miles away, rather than providing immediate medical attention, would cause a significant delay, if not a complete denial of medical care.

Upon further consideration of the papers, pleadings, testimony and other evidence presented in this case, the Court finds that plaintiff's condition on May 22, 1997 was an exceptional circumstance obviously requiring immediate medical attention. A review of the videotape along with the testimony presented at trial confirms this finding. The Court finds that the plaintiff's condition on May 22, 1997, immediately prior to his transport out of the Allred Unit, was open and obvious, that Dr. Sabater was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed, that she actually drew that inference and that her intentional failure to act cause a prolonged delay in medical care and resulted in substantial

injury to Michael Bias. The Court finds that defendant Sabater was deliberately indifferent to the serious medical needs of Michael Bias and that her conduct resulted in his injuries.

IT IS THEREFORE ORDERED that defendant Sabater is liable for plaintiff's injuries under 42 U.S.C. § 1983. Monetary damages will be determined at a later date after any further proceedings which may be deemed necessary by the Court. Final judgment will be entered at that time.

SO ORDERED this 24 day of July, 2002.

"s/ Jerry Buchmeyer"
JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

U.S. District Court
Northern District of Texas
FILED
JUL - 8 2002
CLERK, U.S. DISTRICT COURT
By "s/ T. Stewart"
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

MICHAEL BIAS	§	
TDCJ NO. 769345	§	
Plaintiff,	§	
	§	
V.	§	7:99-CV-033-R
	§	
DR. NENITA SABATER	§	
Defendants.	§	

ORDER

Came on this day to be heard Defendant Sabater's motion for summary judgment and Plaintiff's response thereto and the Court finds and orders as follows:

This is an action brought pursuant to 42 U.S.C § 1983 by an inmate who, at the time of the events giving rise to his

complaint, was confined in the Allred Unit of the Texas Department of Criminal Justice in Iowa Park, Texas.

Plaintiff, Michael Bias, claims that Dr. Nenita Sabater was deliberately indifferent to his serious medical needs which constitutes cruel and unusual punishment, a violation of the Eighth Amendment of the U.S. Constitution. Mr. Bias claims that, while incarcerated in the James V. Allred Unit of the Texas Department of Criminal Justice, he overdosed on his medication and went into a coma. He alleges that Dr. Sabater did not sufficiently examine him to determine whether he had overdosed, whether he was in danger of going into a coma, or whether he was at risk of developing necrosis in his hip and right side. Mr. Bias claims that, as a result of Dr. Sabater's deliberate indifference to his serious medical needs, he was left lying on his right side without being moved or rotated which cut off the blood circulation causing infection and necrosis. Plaintiff seeks monetary damages for the alleged

violation of his Eighth Amendment rights.

Defendant, Dr. Nenita Sabater, denies the plaintiff's allegations. Dr. Sabater claims that she acted in good faith in providing appropriate medical care of Mr. Bias. She claims that she was not deliberately indifferent to his serious medical needs and that she did not violate his rights under the Eighth Amendment.

In support of her motion for summary judgment, Dr. Sabater argues that (1) she is entitled to a qualified immunity defense because Plaintiff has failed to allege a violation of a constitutional right, she acted in good faith, did not violate any clearly established law, and her actions were objectively reasonable; (2) Plaintiff has no evidence to support his allegations; (3) Plaintiff's complaint sounds in negligence which is not actionable under the Civil Rights Act, and; (4) Plaintiff failed to exhaust his administrative remedies prior to filing suit.

In response, Plaintiff argues that Dr. Sabater was aware that he had attempted suicide and that she was aware he was non-responsive and that she was deliberately indifferent to his need for medical care while he was comatose. *See Plaintiff's Brief in Support of His Motion in Opposition to Defendant Dr. Sabater's Motion for Summary Judgment.*

In order to state a colorable claim for the denial of medical care under the Eighth Amendment, an inmate must allege acts or omissions "sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292 (1976). "Deliberate indifference" under the Eighth Amendment occurs only where a prison official subjectively knows of and disregards substantial risk to the inmate's health or safety. *Farmer v. Breennan,* 511 U.S. 825, 837, 114 S.Ct. 1970, 1979 (1994); *Hare v. City of Corinth, Miss.*, 74 F.3d 633,

650 (5th Cir. 1996). A delay in medical care can, in some instances, constitute an Eighth Amendment violation if it results in substantial harm. *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993); *Wesson v. Oglesby*, 910 F.2d 278, 284 (5th Cir. 1990).

While a delay in providing treatment may rise to the level of a constitutional violation, negligent or erroneous medical treatment or judgment does not provide a basis for a § 1983 claim. *Graves v. Hampton*, 1 F.3d 315, 319 (5th Cir. 1993). As long as jail medical personnel exercise professional medical judgment, their behavior will not violate a prisoner's constitutional rights. *See Youngberg v. Romero*, 457 U.S. 307, 322-23, 102 S.Ct. 2452, 2461-62 (1982). A disagreement over the appropriate medical treatment constitutes, at most, a possible claim of medical malpractice appropriately addressed under state law. *E.g. Estelle v.*

Gamble, 429 U.S. at 107-08, 97 S.Ct. at 293; *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991); *Fielder v. Bosshard*, 590 F.2d 105, 107 (5th Cir. 1979).

A review of the exhibits submitted by Plaintiff reflect that, immediately prior to Plaintiff being transported out of the Allred Unit, he was unresponsive to verbal orders and was dressed by officers. *Id. At Exhibit "C."* It appears that at least one officer had reservations about transporting Bias because he appeared unconscious. *Id. At Exhibit "D."* A physician at the Monford Unit apparently believed that Plaintiff's necrosis and infection was a result of a compression injury that occurred prior to his arrival at the Monford Unit. *Id. At Exhibit "H."* One of the Defendant Sabater's exhibits reflects that when Bias arrived at the Robertson Unit, he was lying on the floor of the transport van, his skin was displaced and he was not responsive to verbal stimuli or painful stimuli. *Appendix to Defendant's Motion for Summary Judgment p.*

20.

It is clear from the record and Plaintiff does not dispute, that he received some medical care from the Texas Department of Criminal Justice. However, there remain disputed factual issues related to Dr. Sabater's knowledge of Plaintiff's condition and with regard to the reasonableness of her conduct under the circumstances. Absent a determination on the disputed facts of this case, the Court cannot make a determination as to whether or not Plaintiff was wrongfully denied care under the circumstances. *See Harris v. Hegmann*, 198 F.3d 153, 159 (5th Cir. 1999) (finding that a colorable Eighth Amendment claim was stated where the inmate alleged that his repeated requests for medical treatment after the failed surgical repair of a broken jaw were ignored).

Defendant moves for summary judgment on the basis of qualified immunity. Government officials are entitled to

qualified immunity from suit when performing discretionary functions unless their conduct violated statutory or constitutional rights, clearly established at the time of the alleged incident, of which a reasonable person would have known. Gibson v. Rich, 44 F.3d 274, 277 (5th Cir. 1995). The question of qualified immunity should be resolved at the earliest possible stage of litigation because it involves an entitlement to immunity from suit. *Hunter v. Bryant*, 502 U.S. 224, 226, 112 S.Ct. 534, 536 (1991); *accord Gibson*, 44 F.3d at 277.

Unfortunately, the Court is unable to determine, upon the present record, whether or not Dr. Sabater is entitled to qualified immunity. Plaintiff has stated a colorable Eighth Amendment claim that he was denied medical care. This right was clearly established at the time of the alleged violation. Here, genuine issues of material fact remain with regard to the facts and circumstances surrounding the alleged violation and

Dr. Sabater's alleged involvement Such factual issues go directly to the heart of the question of qualified immunity. While it may ultimately be found that Dr. Sabater is entitled to qualified immunity, the Court cannot make that determination based upon the record currently on file in this case. Questions remain, the answers to which are necessary for the Court to make factual determinations with regard to the conduct of Defendant Sabater and whether such conduct, if any, rose to the level of a constitutional violation of which a reasonable person would have known. Therefore, Defendant Sabater is not entitled to qualified immunity at this time.

Next, Defendant claims that she is entitled to summary judgment because Plaintiff failed to exhaust his administrative remedies prior to filing this lawsuit. Under the Prison Litigation Reform Act of 1995, inmates bringing legal challenges to prison conditions are required to exhaust administrative remedies prior to filing suit. 42 U.S.C. §

1997e(a); *Porter v. Nussel*, 534 U.S. 516, ____,122 S.Ct. 983, 988 (2002). The United States Supreme Court recently clarified the meaning of "prison conditions" by holding that the exhaustion requirement applies to "all inmate suits about prison life, whether they involve general circumstances or particular episodes." *Porter,* 122 S.Ct. at 922.

Defendant concedes that Plaintiff did file administrative grievances concerning part of the subject matter of this case. She argues, however, that the grievances did not refer to her "fail[ure] to adequately treat Bias' suicidal tendencies." *Brief in Support of Defendant Sabater's Motion for Summary Judgment p.8.* The Court disagrees. Plaintiff filed three grievances. In his first grievance he complained that, following an overdose of pills, he was not provided proper medical care and he was not immediately transferred via ambulance to a hospital. *Appendix to Defendant's Motion*

for Summary Judgment pp.5-7. He alleged that the failure to provide him with proper treatment or immediately transport him to a hospital resulted in the injury to his hip. *Id. At p. 7.* In his second grievance, Plaintiff maintains that he was unconscious and that the officers should have called an ambulance to transport him. *Id at p. 9.* Plaintiff states in his third grievance that he took an overdose of pills which resulted in him becoming comatose and that, while comatose, he was left in one position so long that his circulation was cut off. *Id. At p. 3.* It is clear that Plaintiff's grievances raised the issue of the propriety of the medical care received while confined in the Allred Unit following his drug overdose. Accordingly, the Court concludes that Plaintiff exhausted his administrative remedies prior to filing this lawsuit.

Summary judgment is proper when the pleadings and evidence illustrate that no genuine issue exists as to any material fact and that the movant is entitled to judgment as a

matter of law. Fed. R. Civ. P. 56(c); *Slaughter v. Southern Talc Co.*, 949 F.2d 167, 170 (5th Cir. 1991). Disputes concerning material facts are genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir 1996) (en banc) (quoting *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986)). Substantive law provides that an issue is "material" if it involves a fact that might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510; *Burgos v. Southwestern Bell Telephone Co.*, 20 F.3d 633, 635 (5th Cir. 1994). The nonmovant is not required to respond to the motion until the movant properly supports his motion with competent evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986); *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir.

1995). However, once the movant has carried his burden of proof, the nonmovant may not sit idly by and wait for trial. *Page v. DeLaune*, 837 F.2d 233, 239 (5th Cir. 1988).

When a movant carries his initial burden, the burden then shifts to the nonmovant to show that the entry of summary judgment is inappropriate. *Celotex*, 477 at 322-24, 106 S.Ct. at 2552-53; *Duckett v. City of Cedar Park, Tex.*, 950 F.2d 272, 276 (5th Cir. 1992). Although the nonmovant may satisfy this burden by tendering depositions, affidavits, and other competent evidence, "conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden," *Douglass*, 79 F.3d at 1429, as " the adverse party's response ... must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Merely colorable evidence or evidence not significantly probative, however, will not defeat a properly supported motion for summary judgment. *Anderson*, 477

U.S. at 249-50, 106 S.Ct. at 2510-11. Furthermore, a mere scintilla of evidence will not defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512; *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086 (5th Cir. 1994).

Summary judgment evidence is viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986); *Rosado v. Deters*, 5 F.3d 119, 123 (5th Cir. 1993). In addition, factual controversies are resolved in favor of the nonmovant, but only when both parties have submitted evidence of contradictory facts, thus creating an actual controversy. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)(en banc). In the absence of any proof, however, the Court does not assume that the nonmovant could or would prove the necessary facts. *Id.*

In making its determination on the motion, the Court looks at the full record including the pleadings, depositions, answers to interrogatories, admissions, and affidavits. Fed. R. Civ. P. 56(c); *Williams v. Adams*, 836 F.2d 958, 961 (5th Cir 1988). However, "the [Court's] function is not [ ] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249, 106 S.Ct. at 2511. The movant's motion for summary judgment will be granted if he meets his burden and the nonmovant fails to make the requisite showing that a genuine issue exists as to any material fact. Fed. R. Civ. P. 56(c); *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1119 (5th Cir. 1992).

The summary judgment evidence presented in this case establishes that there are genuine issues of material fact that

remain with regard to Dr. Sabater's claim of qualified immunity. The evidence further establishes that Plaintiff exhausted his administrative remedies prior to filing this lawsuit.

IT IS THEREFORE ORDERED that Defendant's motion for summary judgment is DENIED.

SO ORDERED this 8 day of July, 2002.

"s/ Jerry Buchmeyer"
JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

42 U.S.C. § 1983. Civil action for deprivation of the rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1291. Final Decisions of Dstrict Courts

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United Stated District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.